Supreme Court, U.S.
FILED
OCT 11 1995

Nos. 95-137 and 95-388

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES L. WILLIAMS, ET AL., PETITIONERS

v.

NATIONAL BASKETBALL ASSOCIATION, ET AL.

ANTONY BROWN, ET AL., PETITIONERS

v.

PRO FOOTBALL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of a nonstatutory labor exemption from the federal antitrust laws after a collective bargaining contract has expired and the parties have reached an impasse in negotiations over a new contract.

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the antitrust laws. The United States previously filed a brief as *amicus curiae*, at the petition

stage and at the Court's invitation, in *Powell* v. *National Football League*, No. 89-1421, which raised an issue similar to the one presented in this case. See 95-137 Pet. App. A60-A79 (reprinting *Powell* brief). In the *Williams* case (No. 95-137), the United States filed an *amicus curiae* brief in the court of appeals. 95-137 Pet. App. A41-A47. In the *Brown* case (No. 95-388), the United States filed an *amicus curiae* brief in the court of appeals in support of rehearing. 95-388 Pet. App. 116a-126a.

STATEMENT

1. *Williams* v. *National Basketball Association*, No. 95-137.

a. This is an action brought by the National Basketball Association (NBA) and its member teams against several professional basketball players and their union, seeking a declaratory judgment that various employment practices do not violate the antitrust laws. In 1988, the NBA and the players' union signed a collective bargaining agreement to last until the end of the 1993-1994 professional season. That agreement provided for a draft of eligible college players, a right of first refusal for teams when their restricted free agent players sought to sign with another team, and an overall cap on player salaries. The agreement expired on June 23, 1994, and the players resisted renewal of the college draft, the right of first refusal, and the salary cap. 95-137 Pet. App. A3-A4.

Before the agreement expired, on June 17, 1994, respondents filed their declaratory judgment action. The players counterclaimed, alleging that the draft, right of first refusal, and salary cap violated the Sherman Act. The players requested a preliminary

injunction barring the teams from entering into any contracts until the case was decided on the merits. The district court consolidated the preliminary injunction hearing with the trial on the merits, and, after a one-day trial, granted the employers' request for declaratory relief and dismissed the players' counterclaim. 95-137 Pet. App. A19-A38. The district court concluded that the challenged employment practices were immune from scrutiny under the antitrust laws "as long as the collective bargaining relationship exists" between the teams and the players. *Id.* at A35. It also held, in the alternative, that, even if the practices were subject to antitrust scrutiny, they were lawful, for they were not subject to any *per se* rule of invalidity (*id.* at A36), and they survived analysis under the "rule of reason" (*id.* at A36-A37).

b. The United States Court of Appeals for the Second Circuit affirmed. 95-137 Pet. App. A1-A18. The court held that "antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a [collective bargaining agreement], or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws." *Id.* at A17.

The court of appeals noted that multi-employer bargaining "was commonplace and essentially unchallenged—despite the existence of the antitrust laws—long before the passage of the federal labor laws," 95-137 Pet. App. A7, and continues to be a "very common practice throughout the United States," involving "millions of employees and thousands of employers," *id.* at A8. It also remarked that "[o]ne important purpose of such bargaining is to

strengthen the employers' hand by preventing a union from whipsawing employers by shutting them down one-by-one." *Ibid.* According to the court of appeals, "[i]t is the essence of multiemployer bargaining that employers jointly establish and maintain a unified front in dealing with a common union"; therefore, it reasoned, employers must "be allowed to meet and agree upon the terms and conditions of employment to be pursued as a unit and to act as though they were a single employer." *Id.* at A9.

The court emphasized that multi-employer bargaining is plainly legal under federal labor law and has been a "conspicuous feature of collective bargaining since the very formation of unions." 95-137 Pet. App. A12-A13. Since employers may collectively "formulate proposals to unions and insist upon the proposals so long as they bargain in good faith," and since "employers may [unilaterally] implement terms and conditions of employment after good-faith bargaining to an impasse," the court reasoned that multi-employer associations must also be permitted to implement, collectively and unilaterally, the terms of employment that they lawfully present to a union in good faith. *Id.* at A13. The court suggested that a contrary ruling would "prevent employers in all industries from jointly bargaining hard with a common union," for, under the players' theory (as the court perceived it), although employers would still be allowed jointly to make proposals, they "could not maintain the status quo after expiration of the agreement and before bargaining to an impasse, nor could they implement new terms after impasse without fear of antitrust sanctions." *Id.* at A17.

2. *Brown* v. *Pro Football, Inc.*, No. 95-388.

a. This is an antitrust suit brought by professional football players who were placed on "developmental squads" of National Football League (NFL) teams and were paid salaries agreed upon among the team owners. A collective bargaining agreement between the owners and the players' union, which had no provision for such squads, expired in 1987, and the owners and players began negotiations towards a new agreement. In early 1989, the owners adopted a resolution allowing each team to maintain a developmental squad of six first-year players, whose salaries were to be a fixed amount, agreed upon by all the teams. That resolution was a departure from the customary NFL practice of establishing all players' salaries through individual negotiation. 95-388 Pet. App. 6a.

In subsequent bargaining, the owners proposed to pay all developmental squad players a fixed salary of $1,000 per week during the 1989 NFL season. After the players' association rejected the proposal, the team owners declared on June 16, 1989, that the collective bargaining had come to an impasse. The NFL then unilaterally imposed the developmental squad proposal, and the Commissioner of the NFL warned team officials that any team that exceeded the $1,000 salary cap would be subject to disciplinary action. 95-388 Pet. App. 7a.

Several players then brought this action to challenge the developmental squad salary agreement. The owners contended that their agreement to impose uniform salaries was protected from antitrust scrutiny under a nonstatutory labor exemption from the antitrust laws. The district court struck that

defense, ruling that the owners' immunity expired when the prior collective bargaining agreement expired (95-388 Pet. App. 75a-79a), or, at the latest, when the parties reached impasse in their negotiations (*id.* at 80a-86a). The district court subsequently granted summary judgment for the players on liability (*id.* at 93a-115a), and, after a jury trial on damages, awarded them over $30 million and permanently enjoined the owners from collectively setting regular season salaries for any category of players. *Brown* v. *Pro Football, Inc.*, 821 F. Supp. 20 (D.D.C. 1993).

b. A divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed. 95-388 Pet. App. 1a-60a. The majority ruled that the developmental squad salary agreement was legal because "the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a. The majority reached that conclusion "[a]fter reviewing relevant Supreme Court precedent and the policies underlying both the [National Labor Relations Act (NLRA)] and the Sherman Act," *ibid.*, but it observed that, "[a]lthough the Supreme Court has recognized a nonstatutory labor exemption to the antitrust laws, the scope of the exemption never has been conclusively delineated," and that "the [Supreme] Court's cases in this area mark out only the general boundaries of the doctrine," *id.* at 11a.

The court of appeals rejected the players' argument that the nonstatutory labor exemption "applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement." 95-388 Pet. App. 14a. Although the majority acknowledged that each of this Court's previous cases involving the nonstatutory labor exemption arose in the context of an antitrust challenge to a union-employer agreement, it observed that "no Supreme Court case expressly limits the exemption in the manner suggested by the [players]." *Id.* at 15a. The court noted that this Court has viewed the nonstatutory labor exemption as a "proper accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in business markets." *Ibid.* (quoting *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)) (emphasis in court of appeals' opinion). It therefore reasoned that "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the product of that process—the collective bargaining agreement." 95-388 Pet. App. 15a. As a result, the majority concluded, "the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law." *Id.* at 16a.

Emphasizing the "delicate balance of countervailing power that characterizes the [collective bargaining] process," the court stated that "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the

federal labor laws." 95-388 Pet. App. 19a-20a. Therefore, the court reasoned, "a proper respect for the national labor policy" requires recognition of the exemption "as a potential shield for all lawful actions taken by either unions or employers pursuant to the collective bargaining process." *Id.* at 20. Conversely, the majority concluded that the policy of the Sherman Act also favors extension of the exemption "where a restraint on competition operates primarily in the labor market," *id.* at 23a, because "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime * * * [by] limit[ing] the rights of individual employees to enter into negotiations with their employers," *id.* at 24a. "[O]nce collective bargaining begins," the majority stated, "the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation—a paradigm that itself contemplates collusive activity on the parts of both employees and employers." *Id.* at 25a.

The court acknowledged that its holding "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act." 95-388 Pet. App. 30a. The court also observed that, "[i]f employees wish to seek the protections of the Sherman Act, they may forego [*sic*] unionization or even decertify their unions." *Ibid.* But, the court believed, "[i]f [employees] choose to avail themselves of the advantages of the collective bargaining process," they have "many benefits" under the federal labor laws, and, "under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with

shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking." *Id.* at 30a-31a.

c. Circuit Judge Wald dissented. 95-388 Pet. App. 34a-60a. Like the majority, she believed that Supreme Court "[p]recedent is of limited assistance * * * in deciding whether to extend the nonstatutory exemption doctrine to the situation at hand." *Id.* at 45. She also viewed the question as one of "[s]triking the appropriate balance" and "examin[ing] the underlying policies and principles of both labor law and antitrust law." *Ibid.* She argued, however, that the majority's decision "sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself." *Id.* at 34a.

Starting from the proposition that, "[a]bsent special statutory or judge-made exemption, a multi-employer agreement unilaterally imposing uniform industry-wide terms of employment * * * runs afoul of the antitrust laws" (95-388 Pet. App. 35a), Judge Wald concluded that the nonstatutory labor exemption does not shield from antitrust scrutiny such terms when they are unilaterally imposed after the parties have reached impasse in the collective bargaining process. *Id.* at 59a (citation omitted). She stressed that, while employers may not unilaterally impose terms of employment during collective bargaining, "after impasse, the employer is free [under federal labor law] to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, because at that point the employer has exhausted its statutory duty to bargain." *Id.* at 52a (citation omitted). "[U]nilaterally-imposed terms," she suggested, "are

inescapably *nontactical* in nature—they are simply the way the employer decides to run his business in the absence of any bargaining agreement. They are not bargaining tactics but the end-product of an unsuccessful bargaining process[.] * * * [They] are a substitute for an agreement, not a means of reaching one." *Id.* at 54a. She therefore argued that, after impasse, the operation of the antitrust laws does not frustrate the collective bargaining process, and that, "when an agreement is no longer in sight or even being sought[,] immunity from antitrust liability for terms employers unilaterally impose should terminate." *Id.* at 60a.

d. The court of appeals denied rehearing and rehearing en banc, with Judge Wald dissenting. 95-388 Pet. App. 61a-63a. Circuit Judge Tatel filed a concurring statement that "[t]he issues have been fully engaged and developed by the majority and dissenting opinions," and that "Supreme Court review is essential to the resolution of these issues." *Id.* at 63a.

DISCUSSION

1. In our *amicus curiae* brief in *Powell* v. *National Football League*, No. 89-1421, we expressed the view that, although employers and employees may (in some circumstances) claim immunity from the antitrust laws for the provisions of a collective bargaining agreement during the term of the agreement and the period of collective bargaining after its expiration, the employers' immunity terminates "when the parties have reached an impasse in their negotiation over a new collective bargaining agreement * * * [and] the employer has made a unilateral, post-impasse change in the provision at issue." 95-137 Pet. App. A76-A77. That continues to

be the position of the United States. We therefore disagree with the decisions of both courts of appeals in these cases.

In *Powell*, we suggested that the Court grant review of the Eighth Circuit's decision, even though, at the time, there was no conflict among the circuits on the precise issue presented, and indeed the question was then one of first impression. Since *Powell*, no conflict in the circuits has developed, and the D.C. Circuit and the Second Circuit have agreed with the Eighth Circuit that conditions of employment unilaterally imposed on unionized employees by multi-employer associations may not be challenged under the antitrust laws. Nevertheless, we believe that the Court should grant review at this time, for the courts of appeals' expansive formulation of the labor exemption is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed.[1] Their rulings unnecessarily force employees to choose between two sets of statutory rights granted by Congress.[2]

While the lower courts' formulation of the non-statutory labor exemption was influenced by the desire to promote labor peace, the six years since the Eighth Circuit's decision in *Powell* have in

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[1] The National Labor Relations Board concurs in this view and in our submission that review by this Court is warranted.

[2] The joint venture characteristics of sports leagues may justify analysis under the rule of reason of unilateral league restraints on wage competition, even though those restraints would be illegal *per se* in different industries. See *McNeil* v. *NFL*, 790 F. Supp. 871, 896-897 (D. Minn. 1992). That is a matter separate from any labor exemption, however, and is not before the Court.

fact witnessed extraordinary turbulence in labor-management relations in every major professional league sport.[3] While a broad labor exemption from the antitrust laws for employers was certainly not the sole cause of that distress in labor-management relations, we believe that it was a significant contributing cause. Moreover, as we stated in *Powell*, the potential for mischief is quite broad, because the courts of appeals' expansive interpretation of the labor exemption extends well beyond professional sports. It affects the entertainment industry, which has an economic structure similar to that of professional sports, characterized by multi-employer bargaining units. See *American Broadcasting Cos.* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 413-414 (1978). It also conceivably affects many other collective bargaining relationships involving multi-employer associations, in employment sectors as diverse as the electrical and construction trades. As the Second Circuit noted, multi-employer labor relationships involve "millions of employees and thousands of employers." 95-137 Pet. App. A8.

The *Brown* case presents the issue for review in a clear fashion, for it is not disputed that the parties to that case reached an impasse in negotiations, or that the employers unilaterally imposed a wage arrangement, agreed upon among themselves, after the impasse. Basically the same issue is presented in *Williams*, but, in several respects, *Brown* is a more suitable vehicle for review. First, the parties in

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[3] The business of professional baseball, which is not subject to the antitrust laws (*Flood* v. *Kuhn*, 407 U.S. 258 (1972)), has continued its history of troubled labor-management relations.

Williams disagree whether an impasse was reached. The district court made no finding on that point; under the legal standard that it adopted (which the Second Circuit upheld), impasse has no significance, and the purported immunity extends as long as the employers and the unionized employees have a collective bargaining relationship. See 95-137 Pet. App. A34. Second, in *Williams*, the district court adjudicated the merits of the antitrust claim and concluded that the challenged practices did not violate the Sherman Act. *Id.* at A35-A37. In *Brown*, by contrast, the district court ruled that the developmental squad arrangement did violate the Sherman Act. That ruling on the merits was not addressed on appeal, and so a decision on the immunity issue is necessary to the final resolution of the case. Third, in *Brown*, the owners imposed a new term of employment not contained in any prior labor contract, whereas in *Williams* the conditions alleged to violate the antitrust laws were contained in a previous collective bargaining agreement. The owners sought to maintain the *status quo*, which they were obliged to do under federal labor law in the absence of an impasse. See *id.* at A3, A7. We therefore suggest that the Court grant the petition in *Brown* and hold the *Williams* petition pending its decision. Alternatively, the Court could grant both petitions and consolidate the cases for argument.

2. The immunity for unilateral employer group action adopted by the courts of appeals is not a logical outgrowth of the nonstatutory labor exemption recognized by this Court. As this Court carefully summarized the law in *Connell Construction Co.*, "a proper accommodation between the congressional

policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that *some union-employer agreements* be accorded a limited nonstatutory exemption from antitrust sanctions." 421 U.S. at 622 (emphasis added). The Court's limitation of its formulation of the exemption to "union-employer agreements" was not inadvertent. Well before enactment of the NLRA, concerted action by a group of employers to control the labor market was recognized as unlawful under the antitrust laws. See *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359 (1926); see also 95-388 Pet. App. 37a (Judge Wald's dissent, collecting lower-court cases). The nonstatutory exemption, an exception to that rule, is necessary to ensure that collective bargaining agreements can be given effect. As Judge Wald observed, "the collective bargaining scheme established by the national labor laws would be mortally undercut if collective bargaining agreements were subject to collateral attack under the antitrust laws as 'combinations in restraint of trade.'" *Id.* at 43a. Since multi-employer bargaining is permitted by federal labor law, collective bargaining agreements entered into by multi-employer units and employees are generally not subject to antitrust challenge. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 661-664 (1965) ("a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws").

The courts of appeals did not ground the nonstatutory labor exemption in collective bargaining *agreements*, however. Rather, they fashioned a far broader implied antitrust immunity for employers,

based on the *process* of collective bargaining contemplated by the NLRA. In doing so, they strayed from the proper basis of the exemption.

The NLRA does primarily regulate the process of collective bargaining. Under the labor laws, however, that process is not an end in itself, but a means to an end. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Properly limited, the nonstatutory labor exemption is simply a common sense recognition of the fact that the ultimate purpose of the labor laws would be frustrated if such labor contracts, once reached, were declared invalid under the antitrust laws. See *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 711-712 (1965) (opinion of Goldberg, J.).

The courts of appeals nonetheless suggested that unilateral multi-employer agreements imposed on unionized employees should be immunized because applying the antitrust laws would disrupt "the delicate balance of countervailing power * * * by giving unions a powerful new weapon, one not contemplated by the federal labor laws." 95-388 Pet. App. 19a-20a; see 95-137 Pet. App. A7-A9, A13-A14. That rationale is flawed, for the labor laws themselves are not concerned with any *particular* balance of power between unions and employers. See *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. at 490. Indeed, this Court has stated that the National Labor Relations Board may not attempt to "regulate the choice of economic weapons that may be used as part of collective bargaining." *Id.* at 490-498. But that is essentially what the courts of appeals have done in

these cases; they have denied organized employees the benefit of an antitrust cause of action because they perceive such a lawsuit to be too powerful an economic weapon.

Neither the text nor the history of the NLRA suggests that Congress intended to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. To the contrary, the predominant thrust of the NLRA was to expand the protection afforded employees. And while the labor laws do promote and encourage the process of collective bargaining, there is insufficient support in the policy of the NLRA for the courts of appeals' conclusion that Congress intended to force employees to choose between their rights under federal labor law and their rights under federal antitrust law.

3. Both the antitrust laws and the labor laws are expressions of fundamental national policy, and courts have no mandate to favor one over the other. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). Consistent with that principle, and also with the familiar principle that exemptions to the Sherman Act are to be narrowly construed, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979), an implied exemption to the antitrust laws should be recognized only when it is "necessary to make the [conflicting statutory scheme] work, and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357

(1963).[4] The necessary accommodation of labor and antitrust policies does not call for the operation of a less stringent test; the accommodation must be firmly grounded in what "labor policy requires" (see *Connell*, 421 U.S. at 622), and should override the antitrust laws only to the extent there is a "conflict" with such a requirement (*Pennington*, 381 U.S. at 666).

In the cases at issue, there is no conflict requiring a broad exemption. After the expiration of a collective bargaining agreement but before impasse, employers are constrained by federal labor law in the terms and conditions of employment that they may impose, and must generally maintain the terms of employment established by an expired labor contract. See *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962). During that period, therefore, an exemption from the antitrust laws for the terms of an expired labor agreement is necessary, for employers would otherwise be forced to chose between committing an unfair labor practice and running the risk of an antitrust violation.

If, however, the parties reach an impasse, many of the constraints imposed on them by labor law are removed, and they become free to use additional

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[4] The implied labor antitrust immunity can also be viewed as a form of implied repeal. It is "well established" that implied repeals are "not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." *National Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981) (citations and internal quotation marks omitted).

economic and legal tools to persuade the other side to reconsider its position. For example, after impasse, labor law permits employers to make unilateral changes in the terms of employment, if those changes have been offered as good faith proposals during the bargaining process. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S 404, 415 n.9 (1982). Moreover, members of a multi-employer bargaining unit are free to negotiate individual arrangements on an interim basis with the union after impasse. *Ibid.* Similarly, after impasse, employees become more likely to use various legal and economic weapons at their disposal, including the right to strike, and there is no reason to believe that Congress intended to deprive employees of the particularly forceful weapon of an antitrust suit. Since the labor laws authorize and contemplate the greater use of economic weapons after impasse, operation of the antitrust laws would not cause a conflict with any party's obligations under federal labor law.

4. As we noted in our brief in *Powell*, the precise point of impasse is not always easily identified, even in retrospect. 95-137 Pet. App. A76-A77. Furthermore, federal labor law, which promotes bargaining, prefers caution in declaration of an impasse to a premature conclusion that further bargaining is futile. Thus, there may be a justification in labor policy for the implied immunity to endure for a reasonable time after impasse—for example, so that employers can ascertain upon advice of counsel whether impasse has in fact occurred and whether the restraint in question would be likely to violate the antitrust laws, and can adjust their business operations to eliminate the proposed restraint. Immunity

should not continue, however, once the employers, after impasse, have jointly elected unilaterally to impose their proposed terms. Such unilateral action, which would be an unfair labor practice if taken prior to impasse, would demonstrate the employers' assumption that impasse has indeed occurred, and should therefore free employees to proceed under the antitrust laws.

CONCLUSION

The petition for a writ of certiorari in No. 95-388 should be granted.

Respectfully submitted.

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OCTOBER 1995